Labuan Ferry Corp Sdn Bhd v Chin Mui Kien (trading under the name and style of Econ Focus Enterprise) & Ors and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS S-02(W)-35–01 OF 2016, S-02(W)-34–01 OF 2016 AND S-02(W)-115–01 OF 2016

TENGKU MAIMUN, VERNON ONG AND ABDUL RAHMAN SEBLI JJCA

18 MAY 2017

Civil Law Act — English law — Applicability — Whether common law doctrine of prime necessity laid down in English case of Allnutt v Inglis (1810) 12 East 527 applicable in Malaysia — Whether reception of that doctrine not excluded by s 3(1) of the Civil Law Act 1956 as there was no other written law in Malaysia that encapsulated Allnutt's doctrine of prime necessity — Whether application of doctrine required the monopoly provider of an essential ferry service between Labuan island and Menumbok in Sabah to charge fair and reasonable rates for its service

The main argument at the hearing of the instant appeals was on the question whether the common law doctrine of prime necessity laid down in the English case of *Allnutt v Inglis* (1810) 12 East 527 was applicable in Malaysia. That doctrine declared that monopoly suppliers of essential services must charge no more than a reasonable price for their services. The respondents in the first appeal herein ('the respondents') finding no other written law in Malaysia upon which they could base their claim, relied upon the doctrine of prime necessity to sue Labuan Ferry Corp Sdn Bhd ('Labuan Ferry') which ran a monopoly ferry service between Labuan island and Menumbok in Sabah. The Government of Sabah had granted Labuan Ferry a licence to operate that service which was the only sea link between Sabah and Labuan and was essential to trade, commerce and transportation between the two places. When the licence expired in June 2010, the state government did not renew it because of numerous complaints that Labuan Ferry had abused its monopoly. Despite the expiry of the licence, Labuan Ferry continued to be the sole provider of a ferry service between Labuan and Menumbok and began to drastically raise its fares. The respondents and the appellant in the third appeal, Wong Thiam Phin, all of whom owned/operated vehicles that transported goods between Sabah and Labuan began to publicly air their complaints about the increasing fares imposed by Labuan Ferry. In retaliation, Labuan Ferry denied the respondents the use of the ferry service which, in one case, resulted in the loss of use of four of their vehicles which were stranded in Labuan for 14 months.

The respondents sued Labuan Ferry in the High Court for a declaration that the fares charged by Labuan Ferry over and above what it was originally permitted to charge by the Sabah Government were unlawful and null and void and should be refunded to the respondents. One of the respondents, Chin Mui Kien, also sought assessment of damages she had suffered for the loss of use and loss of profit on two of her vehicles which were stranded in Labuan because Labuan Ferry had refused to ferry them. Wong Thiam Phin filed a second suit against Labuan Ferry for damages for loss of business and loss of reputation for causing him to breach his contract with a company named Gold Coin. After a joint trial of the two suits, the High Court ordered Labuan Ferry to refund to the respondents the excess ferry charges it had charged them. Both Chin Mui Kien's claim and Wong Thiam Phin's suit were dismissed. In the case of Chin Mui Kien's claim, the trial court held that her claim was unsustainable because she had not taken any steps to mitigate her loss eg by hiring a barge or some other means of transport to take her vehicles out of Labuan as soon as was possible. Wong Thiam Phin's suit was dismissed on the ground he had failed to prove on balance of probabilities that Labuan Ferry knew of the Gold Coin contract and had intended to interfere with its performance. The High Court's decision resulted in the instant three appeals. The trial court agreed with the respondents that pursuant to s 3(1) of the Civil Law Act 1956, the English common law doctrine of prime necessity was applicable to require Labuan Ferry to charge a reasonable price for its monopoly ferry service. This was despite Labuan Ferry's contention that s 3(1) excluded the application of the doctrine of prime necessity because there were other written laws in Malaysia that governed the respondents' claim, such as the Contracts Act 1950, the Competition Act 2010, and the Merchant Shipping Ordinance 1952.

Held, unanimously dismissing the appeals by Labuan Ferry and Wong Thiam Phin; allowing Chin Mui Kien's appeal and ordering the damages payable to her to be assessed by another judge of the High Court:

(1) The ferry service between Menumbok and Labuan which Labuan Ferry monopolised was clearly an essential service that was subject to the common law doctrine of prime necessity. As there was no statute in Malaysia that dealt with the nature of the cause of action filed by the respondents, resort had to be had to the common law doctrine of prime necessity. On the facts and circumstances of the case, there was no reason why that doctrine was not applicable or could not form part of the common law of Malaysia (see paras 62 & 64–65).

(2) The Competition Act 2010, Contracts Act 1950 and Merchant Shipping Ordinance did not contain provisions that regulated the monopoly of provision of essential services such as the ferry service provided by Labuan Ferry and therefore did not have the effect of excluding the application of the common law doctrine of prime necessity. Since those three statutes, or, for that matter, any other statute in force in Malaysia did not

encapsulate the doctrine of prime necessity as laid down in *Allnutt*, which was the law as administered or in force in England on the dates specified in s 3(1)(a), (b) and (c) of the Civil Law Act 1956, then, pursuant to s 3(1), that doctrine 'shall' be applied in Malaysia subject to such qualifications as local circumstances rendered necessary (see paras 54 & 57).

(3) The Competition Act had nothing to do with the common law doctrine of prime necessity. The doctrine was concerned with the obligation of monopoly suppliers of essential products and services to charge fair and reasonable prices. As suggested by its title, the Competition Act was meant to regulate conduct among competitors. It was not meant to regulate monopolies of essential products or services. Most importantly, the Act did not prohibit monopolies. An enterprise that was in a 'dominant position' within the meaning of s 10(1) of the Competition Act could not be equated with a monopoly, which involved no competition at all. This took the monopoly of essential products or services outside the purview of the Competition Act (see paras 59–61).

(4) As for the proviso to s 3(1) of the Civil Law Act 1956, there was no reason why the circumstances in Sabah and Labuan and of their inhabitants would not allow for the application of the doctrine of prime necessity which in pith and substance was a doctrine of universal application to ensure that no person would suffer economic loss at the hands of monopoly providers of essential services like Labuan Ferry. Being vested with the monopoly of a public privilege, Labuan Ferry had no right to impose unreasonable charges, let alone to withhold the ferry service completely from the respondents in the absence of good cause (see paras 63–64).

(5) In finding liability against Labuan Ferry, the trial judge had adequately dealt with the evidence before him and there was no reason to disturb his decision which was primarily based on findings of fact. The findings of the trial judge were not perverse. He had not misapprehended the facts or misapplied the law or considered irrelevant factors or ignored relevant factors in arriving at those findings of fact. In all the circumstances of the case, the increased fares imposed by Labuan Ferry were excessive and unreasonable (see paras 25–26 & 66–67).

(6) The trial judge should not have dismissed Chin Mui Kien's prayer for assessment of damages on the ground that she had not produced evidence to prove her claim. The trial judge should have proceeded with the assessment of damages to enable Chin Mui Kien to adduce evidence to prove the damages she claimed to have suffered. The question whether damages had been proven and what quantum had been proven should only be determined in an assessment proceeding upon proof of liability at the conclusion of the trial, which Chin Mui Kien had in fact succeeded in

doing in the present appeal. Her appeal was accordingly allowed and the matter was remitted to the High Court for assessment of damages by another judge of the court (see paras 77–78).

(7) With regard to the dismissal of Wong Thiam Phin's suit, the trial judge found that it had not been proven on balance of probabilities that Labuan Ferry knew of the Gold Coin contract and had intended to interfere with its performance. Whether Labuan Ferry had the requisite knowledge was a question of fact for the trial judge to determine. The trial judge had meticulously dealt with the evidence and rightly found that the intention to interfere with the performance of a contract was a question that had to be determined objectively. The trial judge did not err either in law or on the facts in dealing with Wong Thiam Phin's claim and there was no justification to override his decision on liability (see paras 79–81).

[Bahasa Malaysia summary

Hujahan utama dalam perbicaraan rayuan-rayuan ini adalah soalan sama ada doktrin common law keperluan utama dalam kes Inggeris *Allnutt v Inglis* (1810) 12 East 527 terpakai di Malaysia. Doktrin ini mengisytiharkan bahawa pembekal-pembekal monopoli perkhidmatan-perkhidmatan penting tidak boleh mengenakan bayaran lebih daripada harga munasabah bagi perkhidmatan mereka. Responden-responden dalam rayuan-rayuan ini ('responden-responden') tidak menjumpai apa-apa undang-undang bertulis di Malaysia untuk mengasaskan tuntutan mereka, bersandar pada doktrin keperluan utama untuk menyaman Labuan Ferry Corp Sdn Bhd ('Labuan Ferry') yang memonopoli perkhidmatan servis antara pulau Labuan dan Menumbok Sabah. Kerajaan Sabah memberi lesen kepada Labuan Ferry untuk mengendalikan perkhidmatan ini yang merupaka laut peghubung antara Sabah dan Labuan dn penting untuk perdagangan dan pengangkutan antara dua tempat ini. Apabila lesen ini tamat pada Jun 2010, kerajaan negeri tidak membaharuinya kerana beberapa aduan bahawa Labuan Ferry menyalah guna monopoli. Walaupun lesen ini telah tamat, Labuan Ferry terus menjadi pembekal tunggal perkhidmatan feri antara Labuan dan Menumbok dan mula menaikkan tambang secara drastik. Responden-responden dan perayu dalam rayuan ketiga, Wong Thiam Phin, yang kesemuanya memiliki/mengendali kenderaan-kenderaan yang mengangkut barang-barang antara Sabah dan Labuan mula mengetengahkan aduan-aduan mereka pada awam tentang kenaikan tambang yang dikenakan oleh Labuan Ferry. Membantah, Labuan Ferry menafikan responden-responden akan penggunaan perkhidmatan feri yang, dalam satu kes, menyebabkan kehilangan penggunaan empat kenderaan mereka yang terkandas di Labuan selama 14 bulan. Responden-responden menyaman Labuan Ferry di Mahkamah Tinggi bagi pengisytiharan bahawa tambang yang dikenakan oleh Labuan Ferry lebih dan melampaui apa yang, pada asalnya, dibenarkan untuk dikenakan oleh Kerajaan Sabah adalah tidak sah dan terbatal dan harus dipulangkan kepada responden-responden. Salah

seorang responden, Chin Mui Kien, juga memohon taksiran ganti rugi yang dialaminya kerana hilang penggunaan dan hilang keuntungan bagi dua kenderaannya yang terkandas di Labuan kerana Labuan Ferry enggan membawa mereka. Wong Thiam Phin memfailkan guaman kedua terhadap Labuan Ferry bagi ganti rugi dan kehilangan reputasi kerana menyebabkan dia melanggar kontrak dengan syarikat bernama Gold Coin. Selepas perbicaraan bersama kedua-dua guaman, Mahkamah memerintahkan Labuan Ferry memulangkan kepada responden-responden lebihan bayaran feri yang dikenakan terhadap mereka. Kedua-dua tuntutan Chin Mui Kien dan guaman Wong Thiam Phin ditolak. Dalam tuntutan Chin Mui Kien, mahkamah bicara memutuskan tuntutannya tidak boleh kekal kerana dia tidak mengambil langkah-langkah untuk memitigasikan kerugiannya iaitu dengan menyewa tongkang atau apa-apa pengangkutan lain untuk membawa kenderaannya keluar dari Labuan secepat mungkin. Guaman Wong Thiam Phin ditolak atas alasan dia gagal membuktikan atas imbangan kebarangkalian bahawa Labuan Ferry tahu akan kontrak Gold Coin dan berniat campur tangan dalam pelaksanaannya. Keputusan Mahkamah Tinggi menimbulkan tiga rayuan ini. Mahkamah bicara bersetuju dengan responen bahawa bawah s 3(1) Akta Undang-Undang Sivil 1956, doktrin common law Inggeris iaitu keperluan utama terpakai untuk mengkehendaki Labuan Ferry mengenakan harga munasabah bagi perkhidmatan monopoli ferinya. Ini walaupun Labuan Ferry menghujahkan s 3(1) mengecualikan pemakaian doktrin keperluan utama kerana tiada undang-undang bertulis lain di Malaysia yang menyelia tuntutan responden, seperti Akta Kontrak 1950, Akta Persaingan 2010 dan Ordinan Perkapalan Saudagar 1952.

Diputuskan, menolak rayuan-rayuan oleh Labuan Ferry dan Wong Thiam Phin; membenarkan rayuan Chin Mui Kien dan memerintahkan ganti rugi dibayar kepadanya ditaksir oleh Hakim Mahkamah Tinggi lain:

(1) Perkhidmatan feri antara Menumbok dan Labuan yang dimonopoli Labuan Ferry jelas perkhidmatan penting yang tertakluk pada doktrin common law keperluan utama. Memandangkan tidak ada undang-undang di Malaysia yang menangani sifat tindakan yang difailkan oleh responden, penyelesaian terdapat dalam doktrin common law keperluan utama. Berkenaan fakta dan keadaan kes tersebut, tidak ada alasan mengapa doktrin ini tindak terpakai atau tidak boleh menjadi sebahagian common law Malaysia (lihat perenggan 62 & 64–65).

(2) Akta Persaingan, Akta Kontrak dan Ordinan Perkapalan Saudagar tidak mengandungi peruntukan yang mengawal monopoli penyediaan perkhidmatan penting seperti perkhidmatan feri yang disediakan oleh Labuan Feri dan oleh itu, tiada kesan pengecualian pemakaian doktrin common law keperluan utama. Memandangkan ketiga-tiga status ini, atau mana-mana undang lain yang berkuat kuasa di Malaysia tidak merangkumi doktrin keperluan utama seperti yang dinyatakan dalam

Allnut, yang merupakan undang-undang yang ditadbir atau berkuat kuasa di England pada tarikh yang dinyatakan dalam s 3(1)(a), (b) dan (c) Akta Undang-Undang Sivil 1956 maka, menurut s 3(1), doktrin itu hendaklah diserapkan di Malaysia tertakluk pada kelayakan seperti keadaan tempatan yang dilihat perlu (lihat perenggan 54 & 57).

(3) Akta Persaingan tiada kaitan dengan doktrin common law keperluan utama. Doktrin ini adalah berkenaan kewajipan pembekal produk dan perkhidmatan penting monopoli untuk mengenakan harga adil dan munasabah. Seperti yang dinyatakan dalam tajuknya, Akta Persaingan dimaksudkan untuk menyelia tindak-tanduk pesaing. Ini tidak bertujuan mengawal monopoli produk atau perkhidmatan penting. Paling penting, Akta tidak melarang monopoli. Perusahaan dalam kedudukan 'dominan' dalam erti s 10(1) Akta Persaingan tidak boleh disamakan dengan monopoli, yang tidak melibatkan persaingan sama sekali. Ini mengambil monopoli produk atau perkhidmatan penting luar bidang kuasa Akta Persaingan (lihat perenggan 59–61).

(4) Bagi proviso s 3(1) Akta Undang-Undang Sivil 1956, tiada sebab mengapa keadaan di Sabah dan Labuan dan penduduknya tidak membenarkan penggunaan doktrin keperluan utama yang, isi dan kandungannya, adalah pemakaian sejagat doktrin untuk memastikan tiada siapa yang akan mengalami kerugian ekonomi di tangan pembekal monopoli perkhidmatan penting seperti Labuan Ferry. Dengan monopoli keistimewaan awam, Labuan Ferry tidak mempunyai hak mengenakan bayaran tidak munasabah, apatah lagi menafikan responden akan perkhidmatan feri sepenuhnya tanpa alasan yang baik (lihat perenggan 63–64).

(5) Dalam mendapati liabiliti terhadap Labuan Ferry, hakim bicara telah mempertimbangkan dengan secukupnya keterangan di hadapan beliau dan tiada sebab mengganggu keputusan beliau berdasarkan penemuan fakta. Penemuan hakim bicara bukan tidak munasabah. Beliau tidak salah faham fakta-fakta atau salah mengguna pakai undang-undang atau mempertimbangkan faktor-faktor yang tidak berkaitan atau mengabaikan faktor-faktor yang relevan dalam mencapai fakta-fakta tersebut. Dalam semua hal keadaan kes, kenaikan harga oleh Labuan Ferry berlebihan dan tidak munasabah (lihat perenggan 66–67).

(6) Hakim bicara tidak sepatutnya menolak permohonan Chin Mui Kien bagi taksiran ganti rugi atas alasan dia tidak mengemukakan keterangan untuk membuktikan tuntutannya. Hakim bicara sepatutnya meneruskan dengan taksiran ganti rugi untuk membolehkan Chin Mui Kien mengemukakan bukti membuktikan kerugian yang didakwa telah dialami. Persoalan sama ada ganti rugi telah terbukti dan apa kuantum yang telah dibuktikan hanya perlu diputuskan dalam taksiran yang dijalankan berdasarkan keterangan liabiliti pada akhir perbicaraan, yang

sebenarnya telah berjaya dilakukan oleh Chin Mui Kien dalam rayuan ini. Rayuannya dibenarkan dan hal perkara ini dikembalikan kepada Mahkamah Tinggi untuk menilai ganti rugi oleh hakim lain (lihat perenggan 77–78).

(7) Berkenaan penolakan guaman Wong Thiam Phin, hakim bicara mendapati bahawa ini tidak dibuktikan dengan imbangan kebarangkalian bahawa Labuan Ferry mengetahui kontrak Gold Coin dan bertujuan mengganggu pelaksanaannya. Sama ada Labuan Ferry mempunyai pengetahuan yang diperlukan adalah persoalan hak untuk ditentukan oleh hakim bicara. Hakim bicara telah, dengan teliti, mempertimbangkan keterangan-keterangan dan dengan tepat memutuskan bahawa niat mengganggu pelaksanaan kontrak adalah persoalan yang harus ditentukan secara objektif. Hakim bicara tidak menyimpang baik dalam undang-undang atau fakta-fakta dalam menangani tuntutan Wong Thiam Phin dan tidak ada justifikasi untuk melangkaui keputusan beliau berdasarkan kewajipan (lihat perenggan 79–81).]

Notes

For a case on applicability, see 1(3) *Mallal's Digest* (5th Ed, 2015) para 4693.

Cases referred to

Allnutt v Inglis (1810) 12 East 527 (folld)
Birmingham Corp v Sowsbery [1970] RTR 84, QBD (refd)
Champion Motors (1975) Sdn Bhd v Tina Travel & Agencies Sdn Bhd [1997] 2 MLJ 160; [1996] 1 MLRH 320, HC (refd)
Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 MLJ 356; [1990] 1 CLJ Rep 57, SC (refd)
Hinkley v Star City Pte Ltd and another (2011) 284 ALR 154, SC (refd)
Kabushiki Kaisha Ngu v Leisure Farm Corp Sdn Bhd & Ors [2016] 5 MLJ 557, FC (refd)
Krishnasamy a/l Supramany v Arab-Malaysian Finance Bhd [2009] 7 MLJ 455; [2008] 3 MLRH 594, HC (refd)
Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor [1984] 2 MLJ 105, FC (refd)
Minister of Justice of the Dominion of Canada v City of Levis [1919] AC 505, PC (refd)
Ratnam v Cumarasamy & Anor [1965] 1 MLJ 228, PC (refd)
Singapore Bus Service (1978) Ltd v Mohd Kamal bin Abas & Anor [1996] 2 SLR 646, HC (refd)
Sky City Auckland v Wu [2002] 3 NZLR 621, CA (refd)
Tribune Investment Trust Inc v Soosan Trading Co Ltd [2000] 3 SLR 405, CA (refd)
Vector Ltd v Transpower New Zealand Ltd [1999] 3 NZLR 646, CA (refd)

A *Wong Thiam Phin v Labuan Ferry Corp Sdn Bhd and another suit* [2015] MLJU 2030; [2016] 1 CLJ 866, HC (refd)

Legislation referred to

B Civil Law Act 1956 s 3(1), (1)(a), (1)(b), (1)(c)
Commerce Act 1986 [NZ]
Competition Act 2010 ss 2, 10(1), (2), (2)(a), (2)(b), 15(1), 64(1)
Contracts Act 1950
Imperial Laws Application Act 1988 [NZ] s 5
C Interpretation Acts 1948 and 1967 s 3
Merchant Shipping Ordinance 1952
Rules of Court 2012

D **Appeal from:** Suit Nos LBN-22–15 of 2013 and LBN-22–7/4 of 2013 (High Court, Labuan)

Lawrence Thien (Chau Chin Tang with him) (Chau & Thien) in Civil Appeal No S-02(W)-35–01 of 2016 for the appellant.
Joan Goh (Goh & Assoc) in Civil Appeal No S-02(W)-34–01 of 2016 for the appellant.
E *PS Ranjan (Kailesh Arumugam with him) (Kailesh Aru & Co) in Civil Appeal No S-02(W)-115–01 of 2016 for the appellant.*
Joan Goh (Goh & Assoc) in Civil Appeal No S-02(W)-35–01 of 2016 for the first to sixth respondents.
F *Lawrence Thien (Chau Chin Tang with him) (Chau & Thien) in Civil Appeal Nos S-02(W)-34–01 of 2016 and S-02(W)-115–01 of 2016 for the respondents.*

Abdul Rahman Sebli JCA:

G

INTRODUCTION

[1] These three appeals originated from two separate suits which were tried jointly in the High Court at the Federal Territory of Labuan, an island off
H mainland Sabah. Having heard arguments by the parties, we reserved judgment to a date to be fixed. We have now reached a unanimous decision and this is our judgment.

[2] The appeal by the appellant in the first appeal, namely Labuan Ferry
I Corp Sdn Bhd (the defendant at the trial, 'Labuan Ferry') was against paras 1 and 2 of the following orders made by the High Court:

(1) judgment be entered against the defendant for the sum of:

(a) the first plaintiff (Chin Mui Kien) — RM14,760;

(b) the second plaintiff (SL Transport Sdn Bhd) — RM204,610;

(c) the third plaintiff (Lim Kian Sen and Lim Kian Wah) — RM95,140;

(d) the fourth plaintiff (Lim Kian Sen) — RM807,000;

(e) the fifth plaintiff (Kasmin bin Kurdi and Zainal bin Kasmin) — RM60,680; and

(f) the sixth plaintiff (SP Hing Seng Sdn Bhd and Ting Sieng Hing) — RM18,640;

(2) interest at the rate of 5%pa for the judgment sum as para 1 above calculated from 6 January 2011 to the date of full settlement to be paid by the defendant to the plaintiffs;

(3) the first plaintiff's claim as follows be dismissed:

(a) damages to be assessed for the loss of use of the vehicles bearing registration No LD811 and LD6116;

(b) damages to be assessed for the loss of profit of the vehicles bearing registration No LD811 and LD6116; and

(c) costs of RM30,000 to be paid by the defendant to the plaintiffs for this suit at the High Court;

(4) costs of RM8,000 to be paid by the defendant to the plaintiffs for the Court of Appeal Case No S-02(IM)-856–05 of 2014.

[3] The first order was in fact an order for Labuan Ferry to refund to the respondents the excess ferry charges that it had charged the respondents over and above the charges fixed by the State Government of Sabah.

[4] The appeal by Chin Mui Kien (the first plaintiff at the trial) on the other hand was against the order at para 3(a) and (b) above whilst the appeal by Wong Thiam Phin (the plaintiff in the other suit) was against the dismissal of his claim for damages against Labuan Ferry for causing breach of his contract with a company known as Gold Coin.

[5] Wong Thiam Phin's grievance was that on 26 May 2011 Gold Coin terminated their contract and he suffered loss and damages as a result. His claim was for annual loss of RM1,106,213.40 calculated over a 21 month period for loss of business which amounted to RM1,935,873.45 and RM100,000 for loss of reputation and inconvenience

A THE CROSS-APPEAL

[6] Labuan Ferry on its part cross-appealed against that part of the decision of the High Court ordering it to refund the sum of RM112,670.00 to Wong Thiam Phin. We dismissed the cross-appeal at the commencement of the hearing and upon objection raised by Wong Thiam Phin on the ground that the cross-appeal did not relate to the subject matter of the appeal by Wong Thiam Phin: *Kabushiki Kaisha Ngu v Leisure Farm Corp Sdn Bhd & Ors* [2016] 5 MLJ 557. Costs shall be borne by Labuan Ferry in the sum of RM5,000.

C THE PRINCIPAL RELIEF SOUGHT

[7] At the High Court, the principal relief sought by the respondents in the first appeal was for a declaration that the excessive charges imposed by Labuan Ferry for its ferry service between the two points, namely Labuan–Menumbok and Menumbok–Labuan were unlawful and null and void.

FACTS OF CASE

[8] For the facts of the case, we can do no better than to reproduce, with the necessary modifications, the headnote of the case as reported in *Wong Thiam Phin v Labuan Ferry Corp Sdn Bhd and another suit* [2015] MLJU 2030; [2016] 1 CLJ 866 in addition to the facts set out by the learned trial judge in his grounds of judgment.

[9] The salient facts are as follows. The respondents in the first appeal and the appellant Wong Thiam Phin in the third appeal were either owners or operators of lorries and trailers who were in the business of transporting goods by sea between Sabah and Labuan.

[10] The claim by the respondents in the first appeal was for a refund of the extra charges in the sums of RM133,990 and RM1,250,860 that Labuan Ferry imposed on them for the use of its ferry service. As for the appellant in the third appeal, the nature of his claim against Labuan Ferry was as mentioned in paras (4) and (5) above, which the learned trial judge dismissed.

[11] Labuan Ferry had, by virtue of a licence granted by the State Government of Sabah, become the sole operator and monopoly of the ferry service between Menumbok and Labuan until the middle of 2012. The ferry service operated by Labuan Ferry under the aegis of the State Government of Sabah was the only sea link between Sabah and Labuan, which was essential to trade, commerce and transportation between Sabah and Labuan. There was no other ferry operator or any other person providing such ferry service between the two points.

[12] The respondents complained that in January 2011, Labuan Ferry unilaterally and unlawfully increased the charges for the use of the ferry service between the two points. The pre-existing ticket price for a none tonne laden lorry was RM270 whereas the increased ticket price fixed by the Sabah Ministry of Finance ('MOF') for the Menumbok–Labuan route was RM1,080 per lorry and it was RM1,120 per lorry for Labuan–Menumbok.

[13] In April 2012, Labuan Ferry increased the charges to RM1,500 and RM1,800, depending on the types of vehicles used. As a result of complaints made by the respondents, which were publicised in the media, Labuan Ferry retaliated by denying the respondents the use of the ferry service. As a consequence of the retaliation, the respondents were unable to deliver the goods and services to their clients between the two points, had four of their vehicles stranded in Labuan for 14 months, and totally lost the use of the vehicles during that period.

THE ARGUMENTS

[14] The respondents' case was that they had no alternative but to use the ferry service to carry on their business of transporting goods between Menumbok and Labuan. It was submitted that by reason of the monopoly and by virtue of the doctrine of prime necessity, Labuan Ferry was under a duty to act in the public interest to serve the public without discrimination, without reasonable exclusion, and at reasonable prices in accordance with the charges regulated by the relevant authority.

[15] Labuan Ferry on the other hand contended that it was not the sole appointed ferry operator for the Menumbok–Labuan–Menumbok sector and did not monopolise the ferry service between the two points and that the doctrine of prime necessity does not and is not applicable in Malaysia and there was no duty on its part to act in the public interest.

[16] According to the appellant, the fares of RM1,080 and RM1,120 that it charged the respondents were the right fares as these were the fares fixed by MOF. There is no dispute however that by cl 8 of the contract executed between the appellant and the State Government of Sabah, the appellant was not allowed to increase the fares without the prior written consent of the state government.

[17] While it is true that the contract expired on 26 June 2010 and was not extended due the complaints made by the respondents, Labuan Ferry continued to operate the ferry service between the two points. It had earlier been issued with a show cause letter arising from the complaints.

A **[18]** The state government then decided to appoint two other operators to operate the ferry service between Menumbok and Labuan. These two operators were supposed to commence service from 12 January 2011 but could not do so due to licensing problems and to acquire suitable ferries to be used for the service. So Labuan Ferry continued to be the monopoly provider of the ferry
B service.

[19] Labuan Ferry contended that after its contract with the Sabah Government expired on 26 June 2010, it was not bound by the terms and conditions of the contract nor the fares fixed by MOF or any other relevant
C authority. It was submitted that it was at liberty to fix its own fares for the ferry service and that the increased fares of RM1,500 and RM1,800 that it charged the respondents were fair and reasonable.

D **[20]** Through the testimony of its chairman (DW1), Labuan Ferry claimed that the demand for the ferry service exceeded supply and because of this it had absolute discretion to sell or not to sell tickets and to refuse any one from using the ferry service due to illegal or unlawful acts.

E **[21]** It needs to be mentioned that although the contract between Labuan Ferry and the Sabah Government had expired, the Jabatan Pelabuhan dan Dermaga Negeri Sabah by letter dated 1 February 2011 had reminded Labuan Ferry that the existing fares for lorries and trailers fixed by MOF were to
F remain.

[22] Labuan Ferry however alleged that the respondents had cheated ('menipu') it by declaring their vehicles as lorries instead of as trailers and by under-declaring their weights, loads and dimensions when using the ferry
G service. Labuan Ferry further alleged that the respondents' lorries were overloaded and exceeded 25 tonnes and should therefore be charged more.

THE ISSUES

H **[23]** Having regard to the nature of the claim and the defence raised, the issues for the High Court's determination were the following:

(a) whether the English common law doctrine of prime necessity applies in Malaysia;

I (b) whether Labuan Ferry was the sole provider of the essential services and if so, whether Labuan Ferry was required to charge reasonable prices for the services provided; and

(c) whether Labuan Ferry had interfered with the performance of Wong Thiam Phin's contract with Gold Coin ('the third appeal').

THE HIGH COURT DECISION

[24] At the conclusion of the trial, the learned trial judge decided the first and second issues in favour of the respondents in the first appeal and proceeded to make the impugned orders against Labuan Ferry. The third issue concerns the appeal by Wong Thiam Phin in the third appeal and will be dealt with later in this judgment. The second issue obviously relates to findings of fact which no doubt involved the question of the credibility of the witnesses. The principle is trite that an appellate court is loath to interfere with such findings.

[25] In any event, we are of the view that on the evidence before him, the learned trial judge was perfectly entitled to make those findings of fact. This is not a case where the findings are perverse or that the learned trial judge had misapprehended the facts or had misapplied the law to the facts. Neither had the learned judge considered irrelevant factors or had ignored relevant factors in arriving at those findings of fact.

[26] The learned judge's evaluation and assessment of the evidence can be found at pp 16–24 of the grounds of judgment (pp 51–59 Part A Vol 1 of the record of appeal). We are satisfied that there had been adequate judicial appreciation of the evidence by the learned trial judge. In the circumstances we do not see any reason to disturb his findings.

THE COMMON LAW DOCTRINE OF PRIME NECESSITY

[27] The issue that perhaps requires our closer examination is Labuan Ferry's contention that the learned trial judge was wrong in accepting the common law doctrine of prime necessity as part of the common law of Malaysia. The doctrine can be traced back to *Allnutt v Inglis* (1810) 12 East 527, a case decided in 18th Century England which concerned a monopoly of the use of a warehouse. The doctrine was laid down in the following terms:

> Every man may fix what price he pleases upon his own property or the use of it but if for a particular purpose, the public have a right to resort to his premises and make use of them, and he has a monopoly in them for that purpose, *if he will take the benefit of that monopoly, he must as an equivalent perform the duty attached to it on reasonable terms* … it is enough that there exists in the place and for the commodity in question a virtual monopoly of the warehousing for this purpose, on which the principle of law attaches … *as long as their warehouses are the only places which can be resorted to for this purpose, they are bound to let the trade have the use of them for a reasonable hire and reward*. (Emphasis added.)

[28] The learned judge in the present appeals had held as follows:

> Based on s 3(1) of the Civil Law Act, the authorities cited, and the facts and circumstances of this case, there is no reason why the doctrine of prime necessity

A should not or is not applicable or cannot be part of the common laws of this country.

B **[29]** In so adopting and applying the doctrine of prime necessity as forming part of the common law of Malaysia, the learned judge relied on three authorities in addition to *Allnutt*, two from New Zealand and one from Canada, namely: (1) *Sky City Auckland v Wu* [2002] 3 NZLR 621; (2) *Vector Ltd v Transpower New Zealand Ltd* [1999] 3 NZLR 646; and (3) *Minister of Justice of the Dominion of Canada v City of Levis* [1919] AC 505.

C **[30]** In *Sky City Auckland* it was held that a business vested with monopoly of a public privilege must in the absence of good cause in a particular case make its facilities available to all and at a reasonable price. In *Vector Ltd* the doctrine of prime necessity was admitted as part of the common law of New Zealand under D s 5 of the Imperial Laws Application Act 1988 which is similar though not identical with s 3(1) of our Civil Law Act 1956 ('the Civil Law Act').

[31] In the Canadian case of *Minister of Justice of the Dominion of Canada*, the Judicial Committee of the Privy Council held that the supply of water was E a matter of prime necessity and that there was an implied obligation on the part of the respondents to provide water supply in consideration for a fair and reasonable payment. This doctrine has been extended to the supply of electricity, gas and other essential services.

F **[32]** Section 3(1) of the Civil Law Act which allows for the reception of the common law of England in Malaysia is couched in the following language:

> 3 Application of UK common law, rules of equity and certain statutes
>
> (1) Save so far as other provision has been made or may hereafter be made by any G written law in force in Malaysia, the Court shall —
>
> (a) in Peninsular Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7 April 1956;
>
> H (b) in Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 1 December 1951;
>
> (c) in Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in I England on 12 December 1949, subject however to subparagraph (3)(ii),
>
> Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

[33] It is thus mandatory to apply the common law of England as administered or in force in England on the dates specified in s 3(1)(a), (b) and (c) of the Civil Law Act where no provision 'has been made or may hereafter be made by any written law in force in Malaysia'. The proviso to s 3(1) comes into play if such common law of England, rules of equity and statutes of general application as applicable in England on the specified dates are applicable in Malaysia.

[34] As to what 'common law' refers to, s 3 of the Interpretation Acts 1948 and 1967 defines it to mean the common law of England. The doctrine of prime necessity as laid down in *Allnutt*, being the common law of England that was in force on the dates specified in s 3(1)(a), (b) and (c) of the Civil Law Act must therefore be applied in Malaysia if no 'other provision has been made or may hereafter be made by any written law in force in Malaysia'. We are not aware of any change in the common law doctrine of prime necessity ever since *Allnutt* was decided in 1810.

[35] Conversely, where 'other provision has been made or may hereafter be made by any written law in force in Malaysia' after the specified dates, it is not permissible to apply the common law doctrine of prime necessity in Malaysia. Clearly the intention behind s 3(1) of the Civil Law Act is to allow the reception of the common law of England only where there is no statutory provision that governs the matter in dispute, subject of course to such qualifications as local circumstances render necessary.

[36] The development of the common law in Malaysia after the specified dates is entirely in the hands of the courts: see *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356; [1990] 1 CLJ Rep 57 where the then Supreme Court through Hashim Yeop Sani CJ (Malaya) held at pp 361–362 (MLJ); p 66 (CLJ):

> Section 3 of the Civil Law Act 1956 directs the courts to apply the common law of England only in so far as the circumstances permit and save where no provision has been made by statute law. The development of the common law after 7 April 1956 (for the states of Malaya) is entirely in the hands of the courts of this country. We cannot just accept the development of the common law of England. See also one of the majority judgments in *Government of Malaysia v Lim Kit Siang in* [1998] 2 MLJ 12 at p 40.

[37] Datuk Lawrence Thien for Labuan Ferry submitted that while the common law doctrine of prime necessity may apply in countries such as England, New Zealand and Canada as part of their common law, it has no place in Malaysia as there are in existence written laws that govern the respondents' claim, namely the Contracts Act 1950 ('the Contracts Act'), the Competition Act 2010 ('the Competition Act') and the Merchant Shipping Ordinance 1952

('the Merchant Shipping Ordinance') and the regulations made thereunder.

[38] We were told that the doctrine of prime necessity is not yet part of the Australian common law due to the existence of relevant legislations, amongst others, the Australian Competition Act: *Hinkley v Star City Pte Ltd and another* (2011) 284 ALR 154.

WHETHER DOCTRINE OF PRIME NECESSITY APPLICABLE

[39] The question is whether the existence of the three statutes referred to by learned counsel excludes the application of the common law doctrine of prime necessity in Malaysia. If they do, then the doctrine as administered or in force in England on 7 April 1956 (for Peninsular Malaysia), 1 December 1951 (for Sabah) and 12 December 1949 (for Sarawak) would have no application and the learned trial judge would have been wrong to apply the common law doctrine in determining liability.

[40] Learned counsel relied on the following passages in the judgment of the New Zealand Court of Appeal in *Vector Ltd* to support his contention that the existence of the three statutes excludes the application of the common law doctrine of prime necessity in Malaysia:

> The common law doctrine of prime necessity, that monopoly suppliers of essential services must charge no more than a reasonable price, was part of the law of New Zealand. The doctrine gave no guidance as to how to fix prices in a modern economy with extensive legislative intervention and was best viewed as a backstop common law remedy applied in the absence of other remedies and where there were no contra-indications as to its use.
>
> The doctrine of prime necessity did not operate in relation to the transmission of bulk electricity by Transpower to Vector, being precluded by the Commerce Act. This was reinforced by the State-Owned Enterprises Act. The only price control provided for was within Part IV of the Commerce Act and was available only when the criteria in Part IV were satisfied.

[41] The New Zealand Court of Appeal then went on to say:

> The Commerce Act 1986 was a marked departure from earlier statutory regulatory schemes. The object as stated in the long title is to promote competition in markets within New Zealand. The primacy accorded to market forces in the present circumstances is subject only to the general prohibition on the improper use of a dominant position in a market contained in s 36 and the institution of price controls under Part IV which, as the Privy Council observed in *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd* [1995] 1 NZLR 385 at p 404, is specifically directed to the regulation of prices in markets which are not fully competitive. Section 36(1) provides:
>
> 36 Use of dominant position in a market —

(1) No person who has a dominant position in a market shall use that position for the purpose of — A

(a) Restricting the entry of any person into that or any other market; or

(b) Preventing or deterring any person from engaging in competitive conduct in that or in any other market; or B

(c) Eliminating any person from that or any other market.

[42] It is pertinent to note that the object of both the New Zealand Commerce Act 1986 and the Competition Act is to promote competition in the market. Subsections 10(1) and (2) of the Competition Act are relevant and they provide as follows: C

10(1) An enterprise is prohibited from engaging, whether independently or collectively, in any conduct which amounts to an abuse of a dominant position in any market for goods or services. D

(2) Without prejudice to the generality of subsection (1), an abuse of a dominant position may include —

(a) directly or indirectly imposing unfair purchase or selling price or other unfair trading condition on any supplier or customer; E

(b) limiting or controlling —

(i) production;

(ii) market outlets or market access; F

[43] The word 'enterprise' and the phrase 'dominant position' are given the following meanings by s 2:

'enterprise' means any entity carrying on commercial activities relating to goods or services, and for the purposes of this Act, a parent and subsidiary company shall be regarded as a single enterprise if, despite their separate legal entity, they form a single economic unit within which the subsidiaries do not enjoy real autonomy in determining their actions on the market. G

'dominant position' means a situation in which one or more enterprises possess such significant power in the market to adjust prices or outputs or trading terms, without effective constraint from competitors or potential competitors. H

[44] What amounts to abuse of dominant position includes those acts that are specified in paras (a) and (b) of sub-s 10(2). Of relevance to note in relation to the issue before us is that the Competition Act does provide for an avenue for complaint against any infringement of any prohibition or the commission of any offence under the Act and this is provided by s 15(1) which reads: I

> The Commission may, upon a complaint by a person, conduct an investigation on any enterprise, agreement or conduct that has infringed or is infringing any prohibition under this Act or against any person who has committed or is committing any offence under this Act.

[45] To directly or indirectly impose unfair selling price or other unfair trading condition on any supplier or customer is an abuse of dominant position within the meaning of s 10(1) of the Competition Act and is prohibited. We do not think it can be disputed that by having monopoly of the ferry service between Menumbok and Labuan, Labuan Ferry was in a dominant position within the meaning of s 2 of the Competition Act.

[46] It was Labuan Ferry's submission that since the respondents' claim relates to an alleged abuse of dominant position by the appellant, their claim must be decided within the context of the Competition Act, specifically s 10(1) and not on any common law doctrine.

[47] It was urged upon us that once it is determined that the common law doctrine of prime necessity does not apply to Malaysia, the respondents' claim premised as it was on this doctrine must fall in limine and the contract for usage of the ferry service between Labuan Ferry and the respondents would then be governed by the Contracts Act and regulated by the Competition Act. Learned counsel did not however address us on the relevance of the Merchant Shipping Ordinance to the issue.

[48] We were referred to s 64(1) of the Competition Act which provides for the right of private action. It stipulates as follows:

> Any person who suffers loss or damage directly as a result of an infringement of any prohibition under Part II shall have a right of action for relief in civil proceedings in a court under this section against any enterprise which is or which has at the material time been a party to such infringement.

[49] Labuan Ferry's submission in this regard was that the respondents' cause of action should have been filed pursuant to this provision, and since it was not, the court ought not to make a decision under the provision in respect of the respondents' claim. This according to learned counsel is because any infringement of the provisions of the Competition Act falls under the purview of s 64(1) and ought therefore to be decided in accordance with the Competition Act. It was submitted that the respondents need to prove their claim under the Competition Act in a new action and Labuan Ferry is entitled to defend the claim.

OUR DECISION ON APPLICABILITY OF DOCTRINE OF PRIME NECESSITY

[50] What we can gather from counsel's argument is that while Labuan Ferry accepts that the respondents indeed have a civil cause of action against Labuan Ferry for increasing the ferry charges and for refusing to allow them to use the ferry service, the action should have been filed in accordance with the provisions of the Competition Act and not under the Rules of Court 2012 and relying on the common law doctrine of prime necessity to establish liability.

[51] The complaint is therefore directed more at the mode of proceeding adopted by the respondents rather than at the principle of law that is applicable to the factual matrix of the case, which is the application of the common law doctrine of prime necessity vis a vis Labuan Ferry's act of increasing the ferry charges and in refusing to allow the respondents to use the ferry service.

[52] We have pondered over the point raised by learned counsel. In our view the mere existence of the Competition Act, the Contracts Act and the Merchant Shipping Ordinance is not key to determining whether the common law doctrine of prime necessity applies in Malaysia. The key to determining the issue is whether the three statutes encapsulate the common law doctrine of prime necessity.

[53] If they do, then learned counsel is right in saying that the doctrine has no application in Malaysia for then it will be excluded by s 3(1) of the Civil Law Act. Liability would then have to be determined by applying the provisions of any or all of these statutes and not the common law doctrine of prime necessity.

[54] However, if the three statutes or, for that matter, any other statute in force in Malaysia are not statutes that deal with and encapsulate the common law doctrine of prime necessity as laid down in *Allnutt*, which was the law as administered or in force in England on the dates specified in s 3(1)(a), (b) and (c) of the Civil Law Act, then the common law doctrine 'shall' be applied in Malaysia, subject to such qualifications as local circumstances render necessary.

[55] We must hasten to add however that before applying the common law doctrine in Malaysia, it must first be determined that the service provided is an essential service. In the context of the present case, it must first be determined that the ferry service provided by Labuan Ferry was an essential service. If it was, then it would be a service of prime necessity and Labuan Ferry who had a monopoly over the service would have an implied obligation to provide the service in consideration for a fair and reasonable payment: *Minister of Justice of the Dominion of Canada*.

A **[56]** In the words of *Allnutt*, 'if he will take the benefit of that monopoly, he must as an equivalent perform the duty attached to it on reasonable terms'. The doctrine therefore makes it obligatory for monopoly suppliers of essential products and services to provide the products and services on reasonable terms. What the reasonable terms are must in our view depend on the facts and
B circumstances of each case.

[57] It is important to appreciate that the Competition Act, the Contracts Act and the Merchant Shipping Ordinance do not contain provisions that
C regulate the monopoly of essential services such as the ferry service provided by Labuan Ferry to the general public in Sabah and Labuan. These statutes are therefore not 'other provision has been made or may hereafter be made by any written law in force in Malaysia' within the meaning of 3(1) of the Civil Law Act. As such they do not have the effect of excluding the application of the
D common law doctrine of prime necessity.

[58] The Competition Act in particular is an Act whose prime object is to promote and protect the process of competition. We reproduce below the three paragraph long title to the Act:

E
> An Act to promote economic development by promoting and protecting the process of competition, thereby protecting the interests of consumers and to provide for matters connected therewith.
>
> WHEREAS the process of competition encourages efficiency, innovation and entrepreneurship, which promotes competitive prices, improvement in the quality
F of products and services and wider choices for consumers:
>
> AND WHEREAS in order to achieve these benefits, it is the purpose of this legislation to prohibit anti-competitive conduct:

G **[59]** It is plain and obvious that the object underlying the Competition Act is to protect the interests of consumers by prohibiting anti-competitive conduct. It is meant to regulate conduct among competitors, as the title to the Act suggests. It is not meant to regulate monopolies of essential products or services. Most importantly the Act does not prohibit monopolies, nor does it
H regulate them.

[60] An enterprise that is in a 'dominant position' within the meaning of s 10(1) of the Act is not to be equated with a monopoly, which involves no competition at all to begin with. This takes the monopoly of essential products
I or services outside the purview of the Act.

[61] Therefore the Competition Act, which is aimed at regulating conduct among competitors, has nothing to do with the common law doctrine of prime necessity which, we must reiterate, is concerned with the obligation by

monopoly suppliers of essential products and services to supply the products and services in consideration for fair and reasonable payments, and not with the process of competition.

[62] The ferry service between Menumbok and Labuan which Labuan Ferry monopolised was clearly an essential service and is therefore subject to the common law doctrine of prime necessity and not to the provisions of the Competition Act.

[63] As for the proviso to s 3(1) of the Civil Law Act, we see no reason why the circumstances of the State of Sabah and the Federal Territory of Labuan and their inhabitants would not allow for the application of the doctrine, which in pith and substance is a doctrine of universal application to ensure that no person will suffer economic loss at the hands of monopoly providers of essential services like Labuan Ferry who flex their muscles to the detriment of those who have no choice but to use their services. It comes as no surprise that the doctrine has withstood the test of time since its inception in 1810.

[64] Being vested with monopoly of a public privilege, Labuan Ferry had no right to impose unreasonable charges for the ferry service, let alone to withhold the service completely from the respondents in the absence of good cause. There is presently no statute in Malaysia that we are aware of that deals with the cause of action of the nature filed by the respondents. Resort must therefore be had to the common law doctrine of prime necessity.

[65] For the reasons aforesaid, we agree with the learned trial judge that on the facts and circumstances of the case, there is no reason why the English common law doctrine of prime necessity should not or is not applicable or cannot form part of the common law of this country.

[66] That disposes of the issue of whether the common law doctrine of prime necessity applies in Malaysia on the facts and circumstances of the case. As for the merits of the appeal by Labuan Ferry, we have mentioned earlier that in finding liability against Labuan Ferry, the learned trial judge had adequately dealt with the evidence before him and we are not prepared to depart from his decision, which as we said was primarily based on findings of fact.

[67] If at all we have anything to add, it is to hold the view that the increased fares imposed by Labuan Ferry was excessive and unreasonable in all the circumstances of the case, given the fact that it had a monopoly over the ferry service between Menumbok and Labuan, which was essential to trade, commerce and transportation between Sabah and Labuan. The appeal by the appellant Labuan Ferry is therefore dismissed with costs of RM50,000 to the respondents in the first appeal.

A THE SECOND APPEAL

[68] We shall now deal with the appeal by Chin Mui Kien ('the second appeal'). The crux of her complaint was that the learned trial judge did not at all proceed to assess or at the very least consider her claim for the loss of use of the two vehicles or for the loss of profit. It was submitted that the learned trial judge erred in failing to direct his mind to the appellant's pleaded prayer for damages to be assessed for such loss of use and loss of profit for the two vehicles. It was argued that the fact that the two vehicles were stranded in Labuan due to Labuan Ferry's refusal to issue ferry tickets meant that she had lost the use of the vehicles to earn income from her transportation business.

[69] In dismissing her prayer for assessment of damages, the learned trial judge amongst others held the view that the appellant should have hired a barge or other means of transportation to transport the two vehicles out of Labuan as soon as possible, in an obvious reference to the appellant's failure to mitigate her losses.

[70] Learned counsel however contended that this was an irrelevant consideration because the appellant's main trade was in the business of transporting her clients' goods between Menumbok and Labuan. By Labuan Ferry's refusal to sell tickets to her, she was prevented from using the two vehicles to earn income.

[71] Learned counsel referred us to three authorities in support of her argument. The first was *Krishnasamy a/l Supramany v Arab-Malaysian Finance Bhd* [2009] 7 MLJ 455; [2008] 3 MLRH 594 where it was held as follows:

> The Plaintiff is entitled to claim for loss of use in the form of general damages. Assessment of damages are based on the evidence adduced and to some extent, the damage may have been inferred or presumed (see *Heng Loong Motor Trading Co v Osman bin Abdullah* [1994] 2 MLJ 456; [1994] 2 MLRH 92).

[72] The second authority was *Champion Motors (1975) Sdn Bhd v Tina Travel & Agencies Sdn Bhd* [1997] 2 MLJ 160; [1996] 1 MLRH 320 where the Court of Appeal in affirming the High Court's decision held:

> At the trial, no receipt was produced by the plaintiff to support the claim for the reason that the receipt was misplaced after a period of ten years.
>
> The defendant at the trial did not offer any witness or document to rebut the facts and evidence so given by the plaintiff.
>
> On the balance of probability, the learned judge found for the plaintiff as claimed.
>
> Also, the appellant knew the purpose the plaintiff bought the said vehicle and the vehicle requires periodic inspection by the authorities and any particulars found at variance with the record kept by the authorities would cause injuries to the plaintiff

as owner of the vehicle having bought it from the appellant. I accepted the submissions by the learned counsel for the plaintiff and held that the loss suffered by the plaintiff is foreseeable and therefore, not too remote.

[73] The next authority was the Singapore case of *Singapore Bus Service (1978) Ltd v Mohd Kamal bin Abas & Anor* [1996] 2 SLR 646 where it was held:

The loss of use in respect of SBS316R should be calculated on the basis of its operational cost thrown away on account of it being detained during the repair period as this was the more consistent basis of calculation than the other method.

A rough estimate of such cost, in the absence of evidence as to the actual operational cost, would be in the region of one-half of the average profit, which figure would include administration costs, insurance, depreciation, maintenance costs and capital investment.

[74] The last case cited was *Birmingham Corp v Sowsbery* [1970] RTR 84. In that case, the corporation claimed general damages for the loss of use and the defendant conceded that it was reasonable and necessary for the corporation to maintain the spare fleet. The corporation was awarded substantial general damages and it was held that the proper method of assessment of these damages was a calculation comprising the true daily standing charge cost multiplied by the number of days that the use of the omnibus was lost to the corporation.

[75] The appellant further submitted that it was wrong for the learned judge to dwell on the issue of lack of evidence produced by the appellant. What the learned judge should have done according to counsel was to order for assessment of damages before the registrar of the High Court, which was what she prayed for in her pleadings.

[76] In opposing the appellant's appeal, learned counsel for Labuan Ferry relied entirely on the grounds of judgment of the learned judge which he submitted were clearly correct in accordance with established principles of law and based on evidence adduced at the trial. He submitted that the learned judge was right in finding that the conditions to found and substantiate a cause of action for the tort of inducing breach of contract was not fulfilled by the appellant, citing *Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor* [1984] 2 MLJ 105.

[77] Having given careful consideration to the matter, we are constrained to agree with the appellant Chin Mui Kien that it was wrong for the learned trial judge to have dismissed her prayer for damages to be assessed on the ground that she produced no evidence to prove her claim. With due respect to the learned judge, since the appellant's prayer was for damages to be assessed, the proper course for him to take would have been to proceed with assessment of

damages in order that the appellant could adduce evidence to prove the quantum of damages that she claims to have suffered.

[78] The question as to whether damages has been proved, and if so how much has been proved, should only be determined in an assessment proceeding upon proof of liability at the conclusion of the trial, which the appellant had in fact succeeded in the present appeal. In the circumstances the appellant's appeal is allowed with costs of RM10,000. The matter is reverted to the High Court for assessment of damages by another judge of the High Court. Costs shall be costs in the cause.

THE THIRD APPEAL

[79] We now come to the third appeal by the appellant Wong Thiam Phin. The learned trial judge found that he had failed to prove, on the balance of probabilities, that Labuan Ferry knew of the Gold Coin contract and therefore intended to interfere with its performance. Whether Labuan Ferry had the requisite knowledge is a question of fact for the trial judge to determine.

[80] In this regard, the learned trial judge had meticulously dealt with the evidence produced before him and had rightly referred to *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 3 SLR 405 for the proposition that the intention to interfere with the performance of a contract is to be determined objectively. His grounds can be found at pp 60–69 of Part A Vol 1 of the record of appeal.

[81] Having regard to the evidence, the grounds of judgment and the arguments of the parties, we are not convinced that the learned trial judge had erred either in law or on the facts in dealing with the appellant's claim. As such there is no justification for us to override his decision on liability. The appeal by Wong Thiam Phin is accordingly dismissed with costs of RM20,000.

[82] Both Chin Mui Kien and Wong Thiam Phin had also appealed against the learned judge's order on costs. Likewise we do not find any justification to interfere with the order as it has not been shown that the learned judge had exercised his discretion wrongly: see *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228 where Judicial Committee of the Privy Council held that the court will not interfere with the exercise of discretion unless it is satisfied that the discretion has been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice. Their appeals against the order on costs are dismissed.

Order accordingly.

Reported by Ashok Kumar